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California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

DEANGELO PANTALION WILLIAMS,

Defendant and Appellant.

A155340

(San Mateo County
Super. Ct. No. 17SF009209)

**ORDER MODIFYING OPINION;
AND DENYING REQUEST FOR
REHEARING
[NO CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the opinion filed June 7, 2019, be modified as follows:

1. The first full paragraph on page 4 of the opinion is hereby deleted and replaced with the following:

In the circumstances of this case, we likewise conclude there is no need to remand for resentencing. Defendant asked the trial court to dismiss the strike prior in the interest of justice, arguing that the five-year enhancement under section 667, subdivision (a)(1) adequately accounted for his previous criminal behavior. He asked for a total term of seven years: the low term of two years for vehicular manslaughter, and five years under section 667, subdivision (a)(1). At the sentencing hearing, the prosecutor agreed that the court had “wide discretion” to sentence defendant to anything between seven and 14 years. Nevertheless, the court sentenced defendant to the maximum term allowed under the plea agreement: the midterm of four years, doubled for the strike prior, an additional year for the prior prison term, and five years under section 667, subdivision (a)(1), for a total of 14 years. The fact that the court declined to limit defendant’s sentence in any other way is a clear indication that it was of the view the

maximum sentence under the plea agreement was appropriate and that it would not have stricken the five-year enhancement if it had discretion to do so.

2. At the end of the next paragraph on page 4 that ends with “You are not a changed person, Mr. Williams, not yet.” The following sentence is added:

The prosecutor pointed out that one of these two prior convictions was a misdemeanor, but that did not affect the court’s sentencing decision.

3. The petition for rehearing filed by appellant on June 21, 2019, is hereby DENIED.

The modifications and orders contained herein effect no change in the judgment.

Dated: _____

POLLAK, P. J.

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Defendant Deangelo Pantalion Williams appeals a judgment entered upon his plea of no contest to vehicular manslaughter. He asks us to remand the matter for resentencing to allow the trial court to exercise its new discretion to strike a prior serious felony conviction enhancement imposed under Penal Code section 667, subdivision (a)(1).¹ He also contends the trial court erred in designating him a habitual traffic offender. We shall reverse the habitual traffic offender designation and otherwise affirm the judgment.

I. BACKGROUND

On the afternoon of June 16, 2017, defendant was driving his car at approximately 65 to 70 miles an hour in a 25-mile-per-hour zone. He drove through two red lights and collided with another vehicle, killing the driver and seriously injuring the passenger in the other vehicle. The passenger in defendant's vehicle was also injured. Defendant showed no signs of intoxication.

¹ All undesignated statutory references are to the Penal Code.

Defendant was charged with vehicular manslaughter (§ 192, subd. (c)(1); count 1), and two counts of reckless driving causing injury (Veh. Code, § 23105, subd. (a); counts 2 & 3). The information alleged count 1 was a serious felony and a third strike offense (§§ 667, subds. (b)–(j), 1170.12, subd. (c)(2), 1192.7, subd. (c), 1192.8, subd. (a)), and included a number of prior conviction and enhancement allegations.

Pursuant to a negotiated disposition, defendant pled no contest to count 1 and admitted it was a serious felony (§§ 1192.7, subd. (c) & 1192.8, subd. (a)), that he had suffered a prior “strike” conviction for a serious or violent felony (§ 1170.12, subd. (c)(1)), that he had suffered a prior conviction of a violent felony, i.e., robbery (§ 667, subd. (a)(1)); that he had served a prior prison term and failed to remain free of custody for five years (§ 667.5, subd. (b)); and that he committed the current offense while on parole (§ 1203.085, subd. (b)). The maximum indicated sentence was 14 years. The remaining counts were dismissed.

Before sentencing, defendant made a *Romero* motion, asking the court to dismiss his strike prior and sentence him instead to the low term of two years, with a five-year enhancement under section 667, subdivision (a)(1), for a total prison term of seven years. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*); 1170.12, subd. (c)(1).) He argued the five-year enhancement adequately accounted for his criminal history.

The trial court sentenced defendant to eight years for vehicular manslaughter—the four-year midterm, doubled for the strike prior (§ 1170.12, subd. (c))—an additional five years for the serious felony prior (§ 667, subd. (a)(1)), and an additional year for the prior prison term (§ 667.5, subd. (b)), for a total prison term of 14 years. The court also deemed defendant a habitual traffic offender. (Veh. Code, § 23546, subd. (b).)

II. DISCUSSION

A. Senate Bill 1393

Defendant asks us to remand the matter to the trial court for resentencing pursuant to Senate Bill No. 1393 (Stats. 2018, ch. 1013, § 1), which amended sections 667, subdivision (a), and 1385, subdivision (b), effective January 1, 2019, to allow a trial court

to exercise its discretion to dismiss a prior serious felony sentence enhancement imposed under section 667. At the time defendant was sentenced, the trial court did not have this authority. (Former § 1385, subd. (b).) Defendant contends, and the Attorney General concedes, these amendments apply retroactively to judgments that are not yet final. We agree. (*People v. Zamora* (2019) 35 Cal.App.5th 200, 208; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971–973 (*Garcia*).)

In such a case, we remand the matter to the trial court unless the record clearly indicates the court would not have dismissed or stricken the prior serious felony conviction if it had discretion to do so at the time of sentencing. (*Garcia, supra*, 28 Cal.App.5th at p. 973, fn. 3; *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110–1111.) This rule has been applied in analogous contexts. For instance, in 2018, trial courts were given authority to strike certain previously-mandatory firearm enhancements. (Senate Bill No. 620 (Stats. 2017, ch. 682, § 2).) In *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427–428, our colleagues in Division One of this court concluded the record contained no clear indication of how the trial court would have ruled if it had had discretion at the time of sentencing to strike the firearm enhancements; the court noted that, although the trial court imposed a substantial sentence, it did not impose the maximum sentence for one of the counts, it ran that term concurrently with another, and it struck prior convictions in the interest of justice. Similarly, in *People v. Chavez* (2018) 22 Cal.App.5th 663, remand to allow the trial court to consider striking a firearm enhancement was found appropriate where the trial court had not imposed the maximum sentence at the original sentence and had not made any statement indicating that it would have imposed the firearm enhancement if it had discretion to do otherwise.

On different facts, the court in *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, reached a different result. After the original sentencing hearing in *Gutierrez*, our high court ruled that a trial court could dismiss strike priors in the interest of justice. (*Ibid.*, citing *Romero, supra*, 13 Cal.4th 497.) The appellate court found it unnecessary to remand to allow the trial court to exercise this discretion, where the trial court had stated that it was appropriate to impose the maximum sentence, and it increased the defendant's

sentence beyond what it believed was required under the three strikes law by imposing the high term for one count and imposing two additional discretionary enhancements. In those circumstances, the appellate court concluded no purpose would be served by a remand for resentencing. (*Gutierrez*, at p. 1896.)

In the circumstances of this case, we likewise conclude there is no need to remand for resentencing. Defendant asked the trial court to dismiss the strike prior in the interest of justice; if the court had granted this request, his sentence would have been reduced by *four years*. In his motion, he expressly argued that the five-year enhancement under section 667, subdivision (a)(1) adequately accounted for his previous criminal behavior. The court declined to strike the prior, instead sentencing defendant to the maximum available term under his plea agreement. This sentencing decision is a clear indication the court would not have stricken a *five-year* enhancement.

The trial court's colloquy during sentencing reinforces this conclusion. The court emphasized the heartbreaking nature of the case—which left the manslaughter victim dead, his wife seriously injured and still disabled, his five children fatherless, and defendant's own passenger injured—as well as defendant's serious criminal history, including an armed robbery, his poor performance on parole, his extreme recklessness in driving 70 miles an hour in a 25-mile-per-hour zone, and the foreseeability that his action would lead to injury or death. Although the court acknowledged it was a “good thing” that defendant had gotten a barber's license, it told him, “You were a bad person for having two serious and violent felonies armed with weapons and being on parole for one . . . armed robbery for \$150 at 7-[Eleven] and then plowing into someone. You are not a changed person, Mr. Williams, not yet.”

In light of the court's words, its refusal to strike the strike prior, and its imposition of the maximum available sentence, we see no possibility it would have stricken the five-year serious felony enhancement if it had had discretion to do so at the time of sentencing. Remand is unnecessary.

B. Habitual Traffic Offender

At the sentencing hearing, the trial court deemed defendant a habitual traffic offender under Vehicle Code section 23546, subdivision (b), and the minute order reflects that designation. That statute provides that if a person is convicted of driving under the influence (Veh. Code, § 23152) and the offense occurred within ten years of two separate violations of specified other statutes, that person is designated a habitual traffic offender. Defendant was convicted of vehicular manslaughter (§ 192), not driving under the influence (Veh. Code, § 23152). By its terms, section 23546 does not apply to him.

Defendant contends the trial court erred in designating him a habitual traffic offender, and the Attorney General concedes the error. We shall reverse this finding. As the Attorney General notes, however, the traffic offender designation is not included in the abstract of judgment, and there is therefore no need to have an amended abstract of judgment forwarded to the California Department of Corrections and Rehabilitation. The record does not reveal whether the court has notified any other governmental agencies of the erroneous designation. If it has done so, it should take any action that is necessary to ensure those agencies are aware the designation has been reversed.

III. DISPOSITION

The finding that defendant is a habitual traffic offender is reversed. The court shall take any necessary action to ensure that defendant is not treated as a habitual traffic offender based on this erroneous designation. In all other respects, the judgment is affirmed.

TUCHER, J.

WE CONCUR:

POLLAK, P. J.

STREETER, J.